Office-Supreme Court, U.S.
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No. 1084

Supreme Court of the United States

OCTOBER TERM, 1965

No. 9913

JAMES P. MOZINGO, III, PETITIONER,

versus

YORK COUNTY NATURAL GAS AUTHORITY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on October 6, 1965.

OPINIONS BELOW

The opinion of the District Court is reported in 238 F. Supp. 964, and is printed in Appendix A hereto. The opinion of the Circuit Court of Appeals is reported in 352 F. (2d) 78, and is sprinted in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1965. By Order of Associate Justice William J. Brennan, Jr., dated December 28, 1965, time for filing of this petition was extended to and including March 4, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254 and 11 U. S. C. 401 *et sequitur*.

QUESTIONS PRESENTED

I. May a plan of composition under the provisions of 11 U. S. C. 403 (e) (1) be confirmed by a Federal Court as fair, equitable and non-discriminatory when the plan makes provision for payment in cash to some dissenting bondholder-creditors for their bonds, without providing for sufficient cash to make such payment to all dissenting bondholder-creditors of the same class, and without designating or disclosing which of said bondholders are to be preferred in making such payment?

II. May a plan of composition, under the provisions of 11 U. S. C. 403 (e) (5) be confirmed by a Federal Court where such plan fails to disclose an agreement for the payment of fees to certain bondholders for the filing of their acceptance of the plan, when other bondholders of the same class are not apprised of such payment and do not receive a like fee for the filing of their acceptance?

III. May a Federal Court impair the obligation of a bond in confirming a plan of composition under the provisions of 11 U. S. C. 401, and following, by declaring that all bonds not tendered for exchange within a limited period of time shall be forfeited and become null and void and of no force and effect, notwithstanding that such bonds provide for their maturity beyond the time limited by the Court for the tender of such bonds for exchange?

IV. May a Federal Court, in furtherance of a plan of composition, force the holders of first-mortgage bonds to surrender their bonds, and accept in exchange therefor, refunding bonds which allow the debtor to issue an unlimited number of "prior lien bonds" which constitute a claim superior to that of the refunding bonds?

STATUTES

The statutory provisions involved are 11 U. S. C. 403 (d) and (e), and Section 59-681, Code of Laws of South Carolina, 1962, printed in Appendix C hereto.

STATEMENT

In August, 1964 the York County Natural Gas Authority, a public authority in the Sate of South Carolina as defined in 11 U. S. C. 401 *et seqitur*, petitioned the District Court for an Order approving a plan of composition of the bonded indebtedness of the Authority. The petitioner James P. Mozingo, III, a bondholder-creditor of the Authority, on his own behalf and that of other bondholders similarly situated, opposed the plan as presented by the Authority. By Order dated February 10, 1965 the District Court approved the plan of composition as presented by the Authority. In a *per curiam* decision filed October 6, 1965 the Fourth Circuit Court of Appeals affirmed the District Court. In its opinion, the Court of Appeals approved portions of the plan which allowed some dissenting bondholders to be paid in cash for their bonds, while other dissenters, such as petitioner, were denied any such option. The Court also approved the payment to certain bondholders of a fee of one-half of one percent ½ of 1%) for filing their acceptance to such plan, when the agreement for such payment was not disclosed to the other bondholders, who received no such fee. Although the majority of the bonds in question

do not mature until 1987, the Court required that all bonds be presented for exchange by March 1, 1972, and if not, further declared that all rights and obligations under the bonds would be forfeited, and the bonds be null and void. The approved plan also provides that the debtor may issue, at a later date, unlimited amounts of "prior lien bonds", which will then become a superior claim to the revenue of the debtor over the bonds received in the exchange.

REASONS FOR GRANTING THE WRIT

1. The lower Court so completely disregarded its duties under the provisions of 11 U. S. C. 403 as to require this Court to exercise its power of supervision to correct such failure.

The governing statute, 11 U. S. C. 403 (e) (1), requires that the Court, before confirming a plan of composition, find that it is fair, equitable, and doese not discriminate in favor of any creditor or class of creditors. The lower Court made the following finding:

> . . . A part of the proceeds (of the refunding) would be used by the bankers to purchase outstanding bonds from persons . . . unwilling to exchange them for the new ones 352 F. (2d) at p. 79.

It is not disclosed in the plan nor in the record which dissenter's bonds would be purchased, and no general offer for the purchase of their bonds has been made to the other bondholders. Clearly, such a provision unfairly discriminates in favor of some unidentified creditor, and after making the above finding, the lower Court completely disregarded its duty to other bondholders in confirming the plan. The resulting prejudice to other bondholders requires that this Court exercise its powers of supervision to correct such inequity.

II. The decision of the Court below is not in accord with the applicable decision of this Court.

Pursuant to an agreement with the investment bankers promoting the plan, which agreement was never disclosed to the bondholders, certain bondholders were paid a fee of one-half of one percent (½ of 1%) of the face value of bonds whose acceptance of the plan they solicited. However, these same bondholders were also paid the same fee for filing their acceptance for bonds which they personally owned. No other bondholders received such fees, nor were they apprised that those bondholders soliciting consents to the plan were receiving such fees. The approval of such practices by the lower Court is in direct conflict with the decision of this Court in *American United Mutual Life Insurance Co. v. Avon Park,* 311 U. S. 138, which held that the very minimum requirement for fair dealing with creditors is the elementary obligation of full disclosure of all interests in the plan of those promoting its acceptance, at the time the creditors' assents to the plan are solicited. The practices approved by the lower Court are clearly in contravention of this principle.

III. The lower Court unlawfully exceeded its authority in impairing the bondholder's rights under their bonds, and in approving provisions of the plan which were not fair, equitable, and for the best interests of the creditors.

The holders of approximately $600,000.00 worth of these **unregistered** bonds were not located or notified of the proposed refunding plan. Despite the fact that their bonds do not mature until the year 1987, the entire investment of these bondholders will be completely wiped out if the bonds are not physically presented for exchange by March 1, 1972. The petitioning authority had asked that this drastic fact become true by March 1, 1967, thereby demonstrating its lack of good faith.

How can it be said that such a drastic proposal is "for the best interest of the creditor"? How can it be said that such a plan is "fair and equitable"? How can it be said that the taxing authority has acted in "good faith" in promoting such a proposition?

Such a forfeiture provision is clearly unreasonable, unfair, and not for the best interests of the creditors. It unlawfully impairs the obligation under the bonds which are involved, and the lower Court exceeded its authority in approving such an impairment.

IV. **The lower Court has decided an important question of federal law which has not been, but should be, settled by this Court.**

The plan of composition approved below allows the debtor to issue, at some later date, other "prior lien bonds" which will constitute a superior claim over the refunding bonds which the bondholders must accept under the plan. The bonds which now must be surrendered are first mortgage bonds, protected against impairment by State law. Section 59-681, Code of Laws of South Carolina, 1962. It is admitted that there is no statutory or judicial precedent supporting approval of this novel plan, which allows the debtor to subordinate the claims of its creditors at any time by the issuance of unlimited amounts of "prior lien bonds". No adequate explanation of this novel term was given in the only communication sent to the bondholders prior to the time their acceptance of the plan was filed. The memorandum sent to bondholders (Record, Exh. P-K) stated only:

> Prior Lien Bonds may be issued to construct a natural gas transmission line . . . (Petitioner's Appendix in lower court, p. 88.)

No explanation of the far-reaching effects of this term was given to the bondholders, despite the fact that neither

the promotors nor bond counsel favoring the present plan had ever encountered such a provision in a bond before (Petitioner's Appendix in lower court, p. 135).

The importance of the decision on this novel point, and its far-reaching effect upon future plans of composition presented under the federal statute, require that this Court express its disfavor with such plans which, in effect, totally destroy the security of bondholders in public taxing agencies.

The knowledge that, upon application under this statute, a debtor could subordinate its creditors by unlimited issues of new bonds could have serious effect upon the ability of such agencies to obtain ready financing for many projects in the public interest.

CONCLUSION

For the foregoing reasons this petition for writ of *certiorari* should be granted.

Respectfully submitted,

HENRY HAMMER,
JAMES P. MOZINGO, III,
Attorneys for Petitioner.

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APPENDIX A

ORDER OF DISTRICT COURT

Petitioner, seeking approval of its proposed plan of composition of outstanding indebtedness allegedly in default, exhibited, on August 25, 1964, its petition, together with exhibits and references, alleging justification of same.[1] The action is pursued under the provisions of Title 11, Chapter 9, United States Code. This Chapter, formerly known as Chapter X of the Bankruptcy Act, insofar as sections 401-404 thereof are concerned, have been declared valid and constitutional by the Supreme Court of the United States. See *United States v. Bekins*, 304 U. S. 27. The United States Constitution confers the power on Congress to enact necessary statutes.[2] Title 28, United States Code § 1334 provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

The fact that the Constitution allows and the National Legislature enacts in accordance with its authority, however, does not enlarge the authority of those seeking relief to exceed the limitation imposed by statute.[3] Within those limits this Court may proceed to render interlocutory decree, retaining such jurisdiction as may be necessary to implement, or carry out the provisions or directions of such decree.[4] With such in mind this Court accepted and assumed jurisdiction.

York County Natural Gas Authority was originally created by the General Assembly of South Carolina in 1954,[5] the Act was later amended April 6, 1957 [6] to function

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[1] Petition for filing of Plan of Composition and Order permitting the filing are incorporated herein and made a part hereof as Appendices I and II hereof.

[2] Art. 1, § 8 cl. 4 provides: "The Congress shall have power to * * * to establish * * * uniform laws on the subject of Bankruptcy throughout the United States."

[3] *Chicot County Drainage Dist. v. Baxter State Bank* (8th Cir.), 103 F. (2d) 847; *In Re South Beardstown Drainage & Levee Dist.* (7th Cir.), 125 F. (2d) 13; *In Re Summer Lake Irr. District* (D. C. Ore.), 33 F. Supp. 504.

[4] *Buell v. City of Montaque.* (9th Cir) 190 F. (2d) 1019.

[5] 48 S. C. Stat. at Large No. 959 (p. 2652 *et seq.*) approved 31 Mar. 1954.

[6] 50 S. C. Stat. at Large No. 694 (p. 1426 *et seq.*).

under changed circumstances which effectually substituted Carolina Pipeline Company as supplier of gas in place of Transcontinental Gas Pipeline Corporation, Pertinent parts of the Act as amended are:

SECTION 1. Section 1 of Act 959 of 1954, amended—York County Natural Gas Authority created.—Section 1 of Act No. 959 of the Acts of 1954, is amended to read as follows:

> Section 1. There is hereby created a body corporate and politic of perpetual succession to be known as the York County Natural Gas Authority (Hereinafter sometimes referred to as the authority). It shall be the function of the authority to purchase, lease, acquire, build, construct, maintain and operate natural gas distribution systems within the service area hereinafter defined and such transmission lines as may be necessary to transport natural gas to the distribution systems from the transmission lines to be constructed by Carolina Pipeline Company or other sources from which natural gas may now or hereafter become available, which transmission lines and distribution systems will serve persons, firms, corporations, municipal corporations, and any subdivision or division of the State located in and nearby to each of the incorporated municipalities of Clover, York, Rock Hill, Fort Mill or any other municipality or thickly populated area in York County. The transmission lines, distribution systems, their component parts, all apparatus, equipment and property incident thereto or used or useful in the operation thereof, and all additions, improvements, extensions and enlargements to any of the same, shall henceforth be referred to collectively in this act as the system. The Authority shall have the further functions and duties prescribed by this act, and shall have all of the powers herein granted.

SECTION 2. Service area further.—Authority shall be empowered to furnish natural gas service throughout the County of York, for the purposes of this Act, the area

of such county shall constitute the Service Area of the Authority.

* * *

SECTION 4. Powers and duties.—

* * *

a. To sue and be sued.

c. To make bylaws for the management and regulation of its affairs, and to define a quorum for its meetings.

d. to acquire, purchase, hold, use, lease, mortgage, sell, transfer and dispose of any property, real, personal or mixed, or any interest therein.

e. To purchase, lease, acquire, build, construct, maintain and operate distribution systems within its service area and such transmission lines as may be necessary to serve the distribution systems and from time to time enlarge and extend such distribution systems and transmission lines.

g. To enter into contracts of long duration for the sale and interruptible gas only, but all of such contracts shall contain a provision permitting the Authority to increase the price charged its customers for gas if the Authority, in turn, shall be required to pay more for its gas than it did on the occasion that such contract was entered into, and no contract of any sort shall be entered into which shall not in all respects be subordinate to any covenant or undertaking which the Authority may make in the proceedings taken in connection with the issuance of any bond or other obligation of the Authority. And, no contract of any sort shall be made respecting the sale of firm gas, which shall be sold in accordance with such schedule of rates as shall from time to time be in effect.

* * *

1. To appoint officers, agents, employees and servants, prescribe the duties of such, fix their compensation, and determine if and to what extent they shall be bonded for the faithful performance of their duties.

m. In its discretion, to employ any person or corporation to operate its System for any fixed period of

time, upon such terms and conditions as the Authority may deem proper.

* * *

o. To borrow money and to make and issue negotiable bonds, notes, and other evidences of indebtedness, payable from all or any part of the revenues derived from the operation of its System. The sums borrowed may be those needed to pay all costs incident to the construction and establishment of the System, and any extension, addition, and improvement thereto, including engineering costs, construction costs, the sum needed to pay interest during the period prior to which the System, or any extension, addition or improvement thereto, shall be fully in operation, such sum as is needed to supply working capital to place the System in operation, and all other expenses of any sort that the Authority may incur in establishing, extending and enlarging the System. Neither the faith and credit of the State of South Carolina, nor of the municipalities of Clover, York, Rock Hill and Fort Mill, in York County, shall be pledged for the payment of the principal and interest of the obligations, and there shall be on the face of each obligation a statement, plainly worded to that effect. Neither the members of the Authority, nor any person signing the obligations, shall be personally liable thereon. To the end that a convenient procedure for borrowing money may be prescribed the Authority shall be fully empowered to avail itself of all powers granted by Sections 59-361 through 59-415 and 59-651 through 59-682, Code of Laws of South Carolina, 1952, as now or hereafter constituted, it being the intent of this provision that further amendments and modifications of these Code provisions shall be deemed to amend and revise correspondingly the powers granted by this paragraph. In exercising the powers conferred upon the Authority by such Code provisions, the Authority may make all pledges and covenants authorized by any provision thereof, and may confer upon the holders of its securities all rights and liens authorized by such Code provisions. Specifically, and notwithstanding contrary pro-

visions in any of such Code provisions, if contrary provisions there be, the Authority may:

(1) Provide that such bonds, notes or other evidences of indebtedness be payable, both as to principal and interest, from the net revenues derived from the operation of its System, as such net revenues may be defined by the Authority.

(2) Covenant and agree that upon it being adjudged in default as to the payment of any installment of principal or interest upon any obligation issued by it, or in default as to the performance of any covenant or undertaking made by it, that in such event the principal of all obligations of such issue may be declared forthwith due and payable, notwithstanding that any of them may not have then matured.

(3) Confer upon a corporate trustee the power to make disposition of the proceeds from all borrowings and of all revenues derived from the operation of the System, in accordance with the resolutions adopted by the Authority as an incident to the issuance of any notes, bonds or other type of securities.

(4) Dispose of all obligations at public or private sale, and upon such terms and conditions as it shall approve.

(5) Make such provision for the redemption of any obligations issued by it prior to their stated maturity, with or without premium, and on such terms and conditions as the Authority shall approve.

(6) Covenant and agree that any cushion fund established to further secure the payment of the principal and interest of any obligations shall be in a fixed amount.

* * *

(8) Prescribe the procedure, if any, by which the terms of the contract with the holders of its obligations may be amended, the number of obligations whose holders must consent thereto, and the manner in which such consent shall be given.

(9) Prescribe the events of default and the terms and conditions upon which all or any obligations shall become or may be declared due before maturity and the terms and conditions upon which such declaration and its consequences may be waived.

SECTION 5. Disposition of revenues.—All net revenues derived from the System, whose disposition the Authority shall not have covenanted or contracted to otherwise dispose of, shall be paid over to York County and to the municipalities which may from time to time be served by it, including the municipalities named and others that may later be served by the System of the Authorty, such county receiving a share thereof in the proportion that the per annum consumption of gas outside of the incorporated areas therein bears, and each municipality receiving, a share thereof in the proportion that the per annum consumption of gas therein bears to the aggregate per annum consumption of gas by the entire Service Area of the Authority.

Petitioner, whose authority so to do is not here an issue, thereafter came into being by the appointment of personnel, various contracts, negotiations, building, etc., and issued revenue bonds, with interest payable thereon, which, at time of commencement of this action had admitted status as follows:

(a) $2,762,000 of Natural Gas System Revenue Bonds, dated September 1, 1957, bearing interest at six separate rates, and varying from 5% to 5.8%, which has not been paid since the interest payment date of March 1, 1961, and is due from such date at the respective rates borne by such bonds.

(b) $450,000 of Natural Gas System Revenue Bonds, dated September 1, 1958, bearing interest at six separate rates, and varying from 5% to 5.80%, which has not been paid since the interest payment date of March 1, 1961, and is due from such date at the respective rates borne by such bonds.

(c) $422,000 of Natural Gas System Revenue Bonds, dated July 1, 1959, bearing interest at six separate rates, and varying from 5% to 5.80%, which has not

been paid since the interest payment date of March 1, 1961, and is due from such date at the respective rates borne by such bonds.

(d) $144,000 of Natural Gas System Revenue Bonds, dated October 1, 1960, bearing interest at 6%, which has not been paid since the interest payment date of September 1, 1962, and is due from such date at the rate borne by such bonds.

In addition, Petitioner had borrowed to meet coupons due on the bonds as follows:

(a) $95,758 for moneys advanced to Petitioner by certain of those who purchased the Outstanding Bonds, used by Petitioner along with its own moneys available, therefore to meet the March 1, 1961 coupons on the Outstanding Bonds described in subparagraph (a), (b) and (c) above.

It is over the composition of this indebtedness that this controversy ensues.

Despite the fact the obligations were in default since the payment of March, 1961, Petitioner has operated the system and continued expansion and development of the system, but it does not have the funds, in being, or in prospect to fully develop its alleged and hoped-for potential or to make improvements.

On March 6, 1964, the Governor of South Carolina approved Act No. 1373 of the Acts of the South Carolina General Assembly,[7] which empowered the Authority to refund its outstanding bonds, to fund its other indebtedness, to raise money for improvements, Sections 2 and 3 of which provided:

SECTION 2. Authority may issue and exchange bonds.—The Authority is hereby authorized to issue, pursuant to Sections 59-651 to 59-682, inclusive, of the 1962 Code, such amount of bonds as it may from time to time hereafter deem necessary in order to exchange such bonds for those of the Authority now outstanding, and in order to provide funds for improvements and extensions to the system of the Authority. The bonds may be disposed of by the Authority on

[7] 53 S. C. Stat. at Large No. 1373 (p. 3380).

such terms as the Authority shall approve and at a discount, if the Authority shall find such a method to be to its advantage. The Authority is expressly empowered to employ such persons or firms of investment bankers as it may deem desirable in effecting the exchange of its outstanding bonds, and to use the proceeds of any bonds that might be sold to pay for the services of such individuals or investment bankers. The Authority is further authorized to issue funding bonds or certificates of indebtedness to such extent as it may deem necessary to fund all arrears of interest. Such funding bonds or certificates of indebtedness shall have such claim to the revenues of the system as the Authority shall provide.

SECTION 3. Payment.—All bonds of the Authority now outstanding and the bonds and certificates of indebtedness of the Authority to be hereafter issued pursuant to the authorization of this and other acts relating to the Authority are hereby declared to be valid and binding obligations of the Authority according to their respective tenor and effect. Such bonds and certificates of indebtedness shall be payable solely from the revenues derived from the system of the Authority and shall have such claim thereto as shall be prescribed in the proceedings of the Authority providing for their issuance.

While this Court does not determine such act necessary to the proceeding hereunder,[8] there remains no question of the sanction of the State Authority.

On April 16, 1964, the Authority, pursuant to authority granted to it in the 1954 Act of the South Carolina General Assembly, *supra*, and the 1964 Act hereinabove set forth as sanctioning debt refunding or composition, unanimously passed "A Resolution Providing for the Issuance and Sale of Four Million Three Hundred Thousand Dollars York County Natural Gas Authority Refunding and Improvement Revenue Bonds dated March 1, 1964," contemplating as composition refunding:

[8] See *United States v. Bekins*, *supra*.

(a) The issuance of $4,300,000 of Natural Gas System Refunding and Improvement Revenue Bonds of the AUTHORITY (the BONDS). The BONDS shall be dated March 1, 1964 and shall mature on March 1, 1964.
(b) The use of BONDS to the extent of $3,778,000 in exchange for the $3,778,000 of OUTSTANDING BONDS;
(c) The sale of $522,000 of BONDS to the INVESTMENT BANKERS in order to provide funds with which to pay expenses incident to the refunding plan and to pay for improvements and extensions to the SYSTEM; and
(d) The issuance of fully registered certificates of indebtedness (the CERTIFICATES), whose obligation shall be junior and subordinate to the BONDS, certain prior lien bonds authorized (but not issued) by the RESOLUTION, and bonds hereafter issued on a parity with the BONDS. Such CERTIFICATES will not bear interest and will be repayable only in the manner provided by the RESOLUTION.

The Resolution sets forth manner and means of bond exchange, and detailed such items as definitions, and other administrations incidental to, but not absolute on the issue of approval or disapproval now before the court.

Prior to the South Carolina Legislative Act of 1964, in anticipation of the necessity of re-financing, Petitioner had entered into a "Refinancing Agreement":

STATE OF SOUTH CAROLINA REFINANCING
COUNTY OF YORK
REFINANCING
AGREEMENT

THIS AGREEMENT between the YORK COUNTY NATURAL GAS AUTHORITY, A Municipal corporation organized under the laws of the State of South Carolina (Hereinafter called the "Authority"), and HERBERT J. SIMS & COMPANY, INC., Investment Bankers, 52 Wall Street, New York, N. Y., and WATKINS, MORROW & COMPANY, Investment Bankers, Woodward Building, Birmingham, Alabama, (hereinafter referred to as the "Bankers"), WITNESSETH:

RECITALS

WHEREAS, the Authority has outstanding $3,778,000 Natural Gas Revenue Bonds; and

WHEREAS, the Authority is in default on the payment of principal and interest thereon; and

WHEREAS, it is in the best interest of the Authority and the Bondholders for a plan of refinancing to be worked out which is acceptable to the Authority; and

WHEREAS, it is in the public interest for the Authority to employ financial consultants with many years of experience in financing of Natural Gas Revenue Bonds; and

WHEREAS, the Bankers have had many years of such experience;

NOW, THEREFORE, in consideration of $10.00 paid each to the other, receipt of which is hereby acknowledged, the parties hereto do hereby mutually contract and agree as follows:

1. THE BANKERS AGREE:

A. To accept employment as the exclusive irrevocable agent of the Authority, for the purposes and during the time herein set forth, and to use their best efforts to carry out the purposes of this Agreement.

B. To prepare a plan of refinancing of the indebtedness of the Authority. Such plan shall include, among other things, recommended rate or rates of interest for the Refunding Bonds, a plan for the Authority to generate cash funds for badly needed extensions and improvements, and a plan to handle bonds which the present owners may not be willing to exchange. A plan acceptable to the Authority must be submitted to the Authority by the Bankers within 30 days from date, failing which the Authority may elect to terminate this agreement by giving to the Bankers immediately effective notice in writing of such termination.

C. That the plan for obtaining cash for the Authority may include a purchase of Revenue Bonds by the Bankers. In such circumstances, the Bankers would

be acting in somewhat of a dual capacity but with the approval of the Authority.

D. Upon approval by the Authority of the original or amended refinancing plan submitted, to use their best efforts to arrange a joint meeting with the known owners of large amounts of the presently outstanding Revenue Bonds of the Authority, within 30 days thereafter. Those in attendance would be representatives of the Authority, of the Bankers, of the Authority's Engineers, of the original leading underwriters of the bonds and of any principal bondholders designated by the Authority.

E. To furnish to the Attorneys of the Authority hereinafter mentioned the principal ingredients required for a new Resolution for such proposed financing program including, among other things, rate or rates of interest, maturity schedules, flow of funds of the Authority, redemption features, etc.

F. To charge for expenses and services a fee for bonds which may be exchanged under the refinancing program of 2½% of the principal amount of such bonds actually exchanged. Out of this amount will be paid the necessary fees to other investment Bankers, including if feasible and possible the original leading underwriters of the Bonds, for assisting in an exchange program.

G. To purchase for cash at 97½% of par plus accrued interest up to $1,000,000 principal amount of bonds. Such bonds shall either be those not exchanged or for cash for extensions or a combination of both. The rate or rates of interest on such bonds are to be mutually agreed upon at the time that the refinancing program is put into effect. Unless otherwise approved in writing by the Authority, not less than $500,000 of the $1,000,000 principal amount of bonds to be purchased for cash by the bankers shall be applied to payment of the costs of such extensions to and improvements of the existing gas system as may be designated by the Authority.

H. To consummate and put into effect the refinancing plan within 12 months from date of approval thereof, or either party hereto may cancel this Agreement by giving to the other immediately effective notice in writing thereof. In the event that no Refunding Bonds or new bonds are issued, the Authority will owe the Bankers nothing for their services, regardless of the cause of such non-issue of Bonds.

I. That subject to approval by the Bankers of the adequacy and sufficiency of extensions and improvements proposed by the Authority, funds therefor in the amount of not exceeding 500,000 may be provided by the Authority, at its election, through issuance and sale to other than the Bankers of revenue bonds having parity with other bonds of the Authority issued and sold to the Bankers or exchanged with existing bondholders.

2. THE AUTHORITY AGREES:

A. To employ the Bankers as its exclusive irrevocable agent, for the purposes and during the time herein set forth, to use their best efforts to carry out the terms and intent of this Agreement.

B. To furnish without cost all resolutions, indentures of trust, etc., which may be required to legally authorize, issue and sell the proposed bonds.

C. To furnish without cost the approving legal opinion of Messrs. Sinkler, Gibbs & Simons, Attorneys, Charleston, S. C.

D. To furnish without cost the new bond blanks.

E. To pay the charges of the Bank acting as Depository and Trustee under the refiancing plan, after initially approving in advance the designation and the amount or basis of such charges.

F. To approve the Bankers acting as Agent and as Purchaser under such refinancing plan.

G. In the event that no bonds are issued, either for refinancing or for new money, then nothing is to be paid the Bankers for their services, regardless of the cause of such non-issue of Bonds.

H. In the event that the plan is not consummated within 12 months from date, then either party hereto may cancel this Agreement, by giving to the other immediately effective notice in writing thereof.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on this the 19th day of September, 1963.

YORK COUNTY NATURAL GAS AUTHORITY

By: /s/ W. BEN DUNLAP
W. Ben Dunlap, Chairman

Attest: /s/ B. A. Lewis
B. A. Lewis, Secretatry

HERBERT J. SIMS & COMPANY, INC.

WATKINS, MORROW & COMPANY

By: /s/ Hugh Morrow, Jr.
Authorized Representative

The "Bankers", in turn, had submitted a proposed refunding plan:

HERBERT J. SIMS & CO., INC. Received 12-16-63

YORK COUNTY NATURAL GAS AUTHORITY
PROPOSED REFUNDING PLAN

In accordance with the Refinancing Agreement, Section 1, Paragraph B, dates September 19, 1963 between the undersigned and the York County Natural Gas Authority, South Carolina, we, your Bankers, propose that the Authority approve the following refinancing plan to be submitted to the Bondholders, subject to the approval as to legality by Messrs. Sinkler, Gibbs & Simons, Charleston, South Carolina.

Details of Refunding Bonds

1-Date of Issue: March 1, 1964
2-Maturity: March 1, 1994
3-Denomination: $1,000

4-Form: Coupon Bonds, Registerable

5-Call Features: Sinking Fund and Refunding @ 102 and interest on any interest payment date upon 30 days notice

6-Paying Agents: (a) Citizens & Southern National Bank (b) Co-paying agent Empire Trust Co., N. Y.

7-4% for 3 years, 4½% thereafter

Method of Handling Total Past Due Interest

1-Registered Bonds dated March 1, 1964, due March 1, 1995

2-Non-interest bearing Bonds

3-Record of registered holders in Citizens & Southern National Bank, Columbia, S. C.

4-Payments to be made proportionately to reduce face amount

5-Reregisterable so as to be transferable and marketable

Bond Resolution

1-Flow of Funds

(A) Daily deposits into Gross Revenue Fund

(B) Operating Expenses

(C) Balance of Revenues to Reserve Fund for a period of 3 years until maximum of $200,000 has been deposited (1)*

(D) Beginning in 4th year, 50% of balance to Reserve Fund until maximum of $200,000 has been deposited (2)*

(E) Beginning in 4th year, 50% of balance to Renewal and Extension Fund up to a maximum of $40,000 in any one year (2)*

(F) Balance to Bond Redemption Fund

(G) Beginning in the 10th year, 10% of the surplus or balance to make payments on registered bonds due March 1, 1965 after payment of interest and the annual maximum payment of $40,000 to the Renewal and Extension Fund and provided the Reserve Fund contains its maximum of $200,000

(H) After all Refunding Bonds have been paid on March 1, 1994, the balance remaining after payment of operating expenses and the maximum annual payment of $40,000 to the Renewal and Extension Fund, will be used to pay unpaid balance of the registered non-interest bearing Bonds due March 1, 1995

(1)* Or until new bond proceeds for construction are expended

(2)* To begin if new bond proceeds for construction are expended prior to estimated 3 year construction period

Form of Refunding and Improvement Bonds

1-Date of issue: March 1, 1964

2-Maturity: March 1, 1994

3-Denomination: $1,000

4-Form: Coupon Bonds, registerable

5-Call features in numerical order semi-annually (A) Sinking Fund March 1, 1969 @ 103 (B) Refunding March 1, 1974 @ 105¼, on any interest payment date thereafter

6-Interest rate: 5¼%

7-Payable from the same flow of funds as Refunding 4-4½% Bonds

Miscellaneous Resolution Provisions to Modify Present Resolution

1-No consulting engineer so long as Charles Stafford is employed by the Authority, unless one year's unaccounted-for-gas exceeds 10% excepting Force Majeur

2-Authority will choose Certified Public Accountants

3-Issue Equal Lien Bonds based on 2 previous years net revenues covering not less than maximum interest of present outstanding bonds and new bonds to be issued 2 times without any limitation by the registered bonds issued for past due interest

4-Deposit of surplus funds up to $50,000 in the Reserve Fund and up to $50,000 in the Operation and Mainte-

nance Fund for operating capital, balance, if any, to the Reserve Fund

5-Annual budget to be approved by Bankers and/or Consulting Engineer

6-Resolution to permit issuance of transmission line bonds payable as an operating charge

7-After setting aside 3 months operating expense for use as capital, balance of cash on hand to be placed in Reserve Fund up to the maximum required

8-New Construction Fund monies until expended as additional security for payment of interest

9-Minimum interest coverages after completion of refunding: Year 1—110%, Year 2—120%, Year 3—130%, Year 4—140%, and thereafter—150%

10-Modification of Construction Fund clauses to conform to new consulting engineer clause

11-10% of the holders of outstanding bonds may sue

Procedure and Technique of Refunding

1-Bonds to be exchanged number for number

2-A specified number of bonds must be called annually prior to purchase or call for tenders by the Authority

3-Upon agreement of interest rates, treatment of back interest, Connecticut Mutual to write to the Authority declaring all bonds due and payable

4-Meeting with representatives of White, Weld & Co., Robinson Humphrey & Co., Alester Furman & Co., B. J. Van Ingen & Co., Inc., J. R. Williston & Beane (formally Clement Evans & Co.), to explain details of refunding plan, ask for cooperation

5-Appointment of Citizens & Southern National Bank, Columbia, S. C. as escrow and exchange agent

6-Print exchange agreements and prospectus, give history, projections of revenues and customers

7-Solicit deposits through all sources, dealers, paying agent, banks, etc.

8-Upon deposit of $3,278,000 or more bonds, effect exchange and pay for $500,000 Refunding and Improvement bonds and up to $500,000 Refunding bonds

Economic Reasons for Exchange

1-The combination interest rates of 4-4½% for the Refunding bonds and 5¼% for the Refunding and Improvement Bonds show:

(A) *Year*	*Projection*	*Maximum Interest*	*Coverage*
1	$205,454	$200,010	1.03 X
2	$227,548	$200,010	1.14 X
3	$257,791	$200,010	1.29 X

(B) Based on the Flow of Funds previously outlined including the payment of back interest, all of the bonds will be retired in 1986 and the back interest will be paid in full by 1989

(C) The proceeds of the $500,000 Refunding and Improvement Bonds is estimated will provide sufficient funds to pay the expenses for the refunding and finance the 3 year improvement program now contemplated by the Authority

(D) Upon completion of the exchange, we believe that after one year of operation the credit of the Authority will be re-established, thus enabling it to negotiate authoritatively with large potential gas customers

(E) It should place the Authority in a strong position to negotiate with Carolina Pipe Line Company relative to the sale of gas to Rock Hill Finishing Company and the Celanese Corporation

Copy of Bond Amortization Table Attached:

1-Based on full amount, $1,000,000 of Refunding and Improvement bonds to be issued

2-Based on prejection of increased revenues with present capital expenditures for ten years

No consideration is given to the higher expenditure of the proceeds from the new 5¼% Refunding and Improvement Bonds.

Respectfully submitted,

WATKINS, MORROW & CO.

HERBERT J. SIMS & CO., INC.

In effect this plan sets up the proposed outline of machinery for accomplishing the borrowing the Authority Resolution of April, 1964, details.

It is undisputed that the allegations of the petition as to its financial difficulty are true, *viz.*:

> "3. That Petitioner encountered a number of unforeseen difficulties in creating and establishing its gas system, including particularly (a) unavoidable delay in financing with resultant loss of one year's anticipated heating season revenues, (b) unanticipated additional construction costs, and (c) exhaustion of maximum allowable capitalized interest funds before generation of sufficient earnings to meet interest cost out of current revenues available after payment of operating costs; and that as a result thereof Petitioner is in default under the terms of its Bond Resolution and Supplements and the requisite number of bondholders have declared all Outstanding Bonds forthwith due and payable pursuant to the requirements of said Resolution and Supplements."
>
> "4. That the revenues pledges for payment of the Outstanding Bonds described above are inadequate to pay said Bonds and the interest thereon as the same mature, after first providing for necessary operating costs; that because of its default Petitioner is unable to obtain necessary funds with which to meet an ever increasing present demand for gas service, particularly in newly established outlying residental developments seeking gas service for central heating, hot water heating and cooking requirements; and that a long period of restricted growth and continued default, with serious limitation upon its ability to properly serve the public and to meet its obligations to its bondholders, will ensue * * *."

Upon affidavit that 85% of the affected creditor bondholders had approved the petition, the Court ordered* same filed and fixed a hearing date as provided in 11 U. S.

* The Order is reported as appendix II to this Order.

C. A. § 403(b),[10] setting time at 10:30 A. M. October 30, 1964, at Greenville, S. C. Protestant J. P. Mozingo thereafter filed his petition of protest alleging:

> "(t)hat he is the owner of certain Bonds, that he received no prior notice of this proceeding although a known bondholder-creditor, that he is dissatisfied with the proposed Plan of Composition, and that he proposes an alternate plan suggested by others (not specified as creditors or bondholders) which he avers is better designed for protecting Petitioner and/or other bondholders. He cited the potential he subscribes allegiance to as Carolina Pipeline Company, not therefore identified with the Plan of Composition as creditor, or approved source of relief, or a party of interest to the proposed plan, pleading the same as the source of guarantee of his security, his solvency as creditor, insofar as his investment is concerned."

On October 21, 1964, ratifying previous verbal assurance by this court, an order decreed: "James P. Mozingo III, will be accorded all rights granted by statute to any objecting bondholder * * *." The Court further provided: (Protestant) "must have his day in court." This he has had, and

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[10] Section 403 (b), in the first paragraph, provides:

Upon approving the petition as properly filed, or at any time thereafter, the judge shall enter an order fixing a time and place for a hearing on the petition, which shall be held within ninety days from the date of said order, and shall provide in the order that notice shall be given to creditors of the filing of the petition and its approval as being properly file, and of the time and place for the hearing. The judge shall prescribe the form of the notice, which shall specify the manner in which claims and interest of creditors shall be filed or evidenced, on or before the date fixed for the hearing. The notice shall be published at least once a week for three successive weeks in at least one newspaper of general circulation published within the jurisdiction of the court, and in such other paper or papers having a general circulation among bond dealers and bondholders as may be designated by the court, and the judge may require that it may be published in such other publication as he may deem proper. The judge shall require that a copy of the notice be mailed, postage prepaid, to each creditor of the petitioner named in the petition at the address of such creditor given in the petition, or, if no address is given in the petition, or, if no address is given in the petition for any creditor and the address of such creditor cannot with reasonable diligence be ascertained, then a copy of the notice shall be mailed, postage prepaid, to such creditor addressed to him as the judge may prescribe. All expense of giving notice as herein provided shall be paid by the petitioner. The notice shall be first published, and the mailing of copies thereof shall be completed, at least sixty days before the date fixed for the hearing.

the hearing has been recessed and reconvened from time to time to accomplish full exploration.

The Court must first face the isue of "who", or "what" is authorized by the National Statute. Section 401 of Title 11 (Chapter 9) provides:

> "This title and proceedings thereunder are found and declared to be within the subject of bankruptcies and, in addition to the jurisdiction otherwise exercised courts of bankruptcy shall exercise original jurisdiction as provided in this chapter for the composition of indebtednesses of * * * (6) incorporated authorities, commissions, or similar public agencies organized for the purpose of constructing, maintaining, and operating revenue producing enterprises."

Section 402 of Title 11 defines confines (sic):

> "The term 'petitioner' shall include any agency or instrumentality referred to in Section 401 of this title."

In the light of this statutory guidance the court examines the statute or status of protestant Mozingo, and Carolina Pipeline. Petitioner is included in the limits of as to a "public" agency, and the statute so limits. The legal test between a private or public authority or agency is whether the authority or agency is subject to control by public authority, state of municipal [11] South Carolina courts, in distinguishing the term public, as opposed to private, opinions in *State v. Whitesides,* 9 S. E. 661, 30 S. C. 579, 584, 585:

> "What is the meaning of the term public"? The term is opposed to the term PRIVATE, and, according to the best lexicographers, means "pertaining to, or belonging to, the people, relating to a nation, state, or comunity."

Petitioner meets the test of the statute. Protestant Mozingo, sponsoring a plan of composition which was, and

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[11] See *Kerr v. Pratt Free Library of Baltimore,* 54 F. Supp. 514, which defines, using the word "public or private corporation", but applicable to "authority" or "agency". Quoting "to make the corporation a public one, its managers, whether trustees or directors, must not only be appointed by public authority but subject to its control." Petitioner meets the test. See also *Norris v. Mayor and City Council of Baltimore,* 78 F. Supp. 451.

is, effectually, Carolina Pipeline Company's hope to gain control of the Petitioner, does not meet the test. Nor do Carolina Pipeline Company, and Thornton, Farish & Gauntt, Inc., its proposed investment bankers in this controversy meet the test. They are classified as "private", without the permission of Section 401 of Title 11.[12]

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[12] Protestant's exhibit 7 is a proposed "Underwriting Agreement York County Natural Gas Authority" obviously prepared by Thornton, Farish & Gauntt, Inc., a part of the cover letter to Senator Mozingo reading:

"This will confirm our various conversations over the past several weeks with regard to your plan of submitting to the Court an implementation to the "Plan of Composition" filed by York County Natural Gas Authority in the United States District Court No. B2075 (hereinafter referred to as "Plan").

As we understand your proposal, you, as a minority bondholder, together with other holders of York County Natural Gas Revenue Bonds, do not feel that the holders of present bonds will be fully protected under the Plan as now submitted to the Court and you have obtained from Carolina Pipeline Company (hereinafter "Carolina") an agreement to lease the properties of the Authority on a long term lease arrangement (hereinafter "Lease") which among other terms and conditions provides that Carolina pay as annual rental direct to a Trustee Bank (hereinafter "Trustee") a sum of money sufficient to pay promptly when due, all principal and interest requirements of presently outstanding $3,778,000 Bonds which are to be exchanged and $850,000 of new Bonds to be issued for the purpose of paying to all holders in cash and/or parity bonds, all past due interest accrued to them since September 1, 1961, all as more fully detailed in the attached letter from Carolina to you, dated October 8, 1964, marked Exhibit No. 1, which by reference hereto is made a part hereof.

You have requested us, as investment banker, to submit to you a firm purchase agreement which may be submitted to the Court as a part of your plan, in order that the Court and the bondholders may examine the relative merits of each and a determination be made as to which more fully protects the inherent rights of the bondholders.

The undersigned officer of this firm is a Director of Carolina and in order to fully avoid any possible ethical or conflict of interest, we wish to submit our commitment to you in the following manner:

A. The cash requirements needed to pay past due interest, assuming no holder would elect to take bonds for interest, would be $850,-354 as of September 1, 1964.

B. For $850,000 Series B parity bonds, bearing interest at 4% for three years and 4¼% thereafter, all as more fully described in Exhibits No. 1 and No. 2 attached hereto, or the amount finally determined to be necessary, but for not more than $85,000 of such bonds, said bonds to be additionally secured by the Lease Rentals from Carolina, copy of such Lease being attached hereto and made a part hereof, we will pay 100% of par value plus accrued interest to date of delivery, subject only to the following conditions:

1. The bonds are to be delivered to the undersigned within 75 days from date hereof (unless extended by mutual consent) together with an unqualified legal opinion of nationally recognized Bond Counsel satisfactory to the undersigned.
2. The Lease to be substantially as attached hereto, with any changes therein having the complete approval and consent of the undersigned.

The fact that Protestant Mozingo cannot present a plan as petitioner does not in any way prevent his acting as creditor, *per se*, through counsel, or associate counsel, and with advisors, as he was and is permitted to do. In the hearings at Greenville and Rock Hill he was accompanied by various persons, specialists and otherwise. The court takes judicial notice of the fact that any plan of composition would "affect his interest materially," and of the provisions of the Chapter which provide:[13]

> "The plan of composition" within the meaning of this Chapter, may include provision modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through issuance

3. The Bond Resolution to be substantially as that previously submitted to the Court, with all references and rights to issue Prior Lien Bonds deleted therefrom. All changes must have the approval and consent of the undersigned.
4. All expenses pertaining to the issuance of and the exchange of the bonds, printing costs, fees and expenses of local attorneys and bond counsel and Court costs are to be paid by the Authority as outlined in Paragraph 4 of Exhibit No. 1 attached, or as the Court may direct. All expenses pertaining to issuance and exchange are to be paid by others and not by the undersigned.
5. The fees, charges and expenses of the underwriters who have been responsible for the Plan of Composition as now filed with the Court, is not to be changed nor decreased in any manner whatsoever; and further that such underwriters be given an opportunity to purchase the bonds under the same terms and conditions enumerated herein, and if purchased by them cancels this commitment without prejudice.

C. While this constitutes our firm commitment to you for submission to Court, in order to expedite relief of the existing Bondholders, we respectfully suggest that you consider also the following:

11. The above commitment as outlined will be honored and our good faith certified check of $17,000 will be deposited with the Court if approved by the Court, Bondholders and Authority; or
2. To avoid any adverse criticism, we guarantee to submit the identical bid under the same terms and conditions outlined above if the bonds are advertised and put up for public sale, with the bonds being awarded to the highest and best bidder.

Nothing contained herein is to be construed as an attempt to negate the existing underwriter's contract with the Authority, which we insist must be honored, but merely as an attempt to implement the plan as filed, which in the final analysis will, in our opinion, materially benefit the existing bondholders.

Trusting that this is satisfactory from your standpoint and assuring you of our desire to be helpful in this instance, we remain

Very truly yours,

/s/ W. L. GAUNTT,
THORNTON, FARISH & GAUNTT, INC.

[13] Title 11 U.S.C.A. § 403(a).

of new securities of any character, or otherwise, and may contain **such other provisions and agreements not inconsistent with this Chapter as the parties may desire.**" (Emphasis added.)

Before concluding the hearing in the matter, this Court reviewed the transcribed testimony, contracts, proposals, acceptances, deposit agreements, and all other papers relating to the plan and presented to the Court [14] by Petitioner and/or protestant. Additionally, a hearing was held in the Rock Hill Division of the United States District Courts for the Western District of South Carolina, on January 23, 1965, to determine a method of transferring the bonds, *pendente lite,* without creating confusion because of the surrender to the transfer agent, or fiscal agent. A copy of that order is attached hereto as Appendix II hereof.

The Court now turns to the interlocutory order of approval or disapproval of Petitioner's plan and any modification thereof in the light of issues raised.[15]

At the time the original order approving the filing of the Petition for Composition the Court made a *prima facie* finding, upon proper and verified showing, that some 85% of the affected creditors, representing substantially more than the required percentage of (51%) required by statute, had approved the Plan of Composition in writing. This approval was accomplished by the surrender of the bearer bonds, accompanied by a consent, as described in appendix II hereof, to the fiscal agent, Citizens & Southern National Bank, Columbia, S. C. At the date of the initial hearing in Greenville this had increased to more than 90%. Protestants presented requests for withdrawal [16] which, if allowed, would have reduced this figure to 85.2% at that hearing and 74.4% at conclusion of the hearing. Thus the necessary jurisdictional fact of the 51% was clearly established, and is no longer at issue.

The Court, however, continues to act in reliance thereon and upon additional consents initially given, and such

[14] As directed in Title 11, U.S.C.A. § 403(e).

[15] See 14.

[16] Protestant represented at the hearings approximately 25% of those outstanding bonds, whose holders had requested withdrawal of consents formerly filed with the fiscal agent.

consents may not be withdrawn or changed except by leave of this Court on proper cause. The applicable statutory provisions establish procedure for withdrawal of consent only in the event of change or modification of the Plan of Composition submitted by Petitioner, which has not occurred. The statutory establishment of specific withdrawal procedure under specific conditions negatives the existence of withdrawal procedure by any other means or under any other conditions.

This proposition is supported by the well recognized maxim:

"Expressio unius est exclusio alterius."

It is also supported by the holding of the United States Supreme Court in the case of *Raleigh & G. R. Co. v. Reid,* 80 U. S. 269, 13 Wall, 269, 20 L. Ed. 570, wherein the Court said:

> "When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode."

Aside from the statutory limitation on withdrawals there exists the further limitation imposed by the fact that when the Petitioner and 51% or more of its creditors join together in asking the Court to consider and approve the Plan of Composition, and in this case 85% of the creditors had so joined at the time of filing of the Petition, there is created thereby an obligation in the nature of a contract or agreement. Having become properly bound thereby, a creditor may not be relieved of this obligation at his own whim, and any such relief must be for cause and with the assent of the Court.

In *Wells Fargo Bank & Union Trust Co. v. Imperial Irr. Dist.,* C. C. A. Cal. 1943, 136 Fed. (2d) 539, 54 Am. Bankr. Rep. N. S. 58, certiorari denied, 64 S. Ct. 784, 321 U. S. 787, 88 L. Ed. 1078, rehearing denied, 64 S. Ct. 940, 322 U. S. 767, 88 L. Ed. 1593, the Circuit Court of Appeals said:

> "The plan of composition is one agreed upon by the District and a majority of the creditors affected and that the function of the Court is to determine whether or not the agreement made complies with the statutory requirements."

Finally on this point it was indicated to affected creditors in Respondent's letter to Bondholders, which was not authorized by the Court as initially sought [17] by Respondent, and such Bondholders had a choice or election as between the plan proposed by Petitioner and the allegedly faster paying "Plan" tendered by Respondent. This undoubtedly caused some creditors to take the view that rather than choose between two opposing plans, they would become neutral and await action by the Court before deciding which plan to sponsor. The fact that so many of the limited number of creditors seeking withdrawal of former consents did not at the same time assent to the Mozingo-Carolina proposal is strong evidence of this. The alternate proposal has undoubtedly been misleading to the creditors as it never reached the level of being a plan available for acceptance by creditors, because (1) Petitioner had not assented, (2) Petitioner did not have the legal ability to carry out and fulfill the alternate proposal, and (3) 51% of the affected creditors did not assent to the alternate proposal. On this account it was disallowed by the Court as a plan in its own right.

Respondent has sought disallowance of a number of the consents on grounds of lack of authority or control by Petitioner. The applicable statute provides that "any creditor may act in person or by an attorney or a duly authorized agent or committee." (Sec. 403(a) Delivery of bearer bonds for exchange along with the consent of the holder is ample evidence of authority. The matter of consents is not regulated by the requirements applicable to creditor groups acting generally through an agent or committee. The control of claims by Petitioner which is disallowed by the Statute (Sec. 403(d) is of that character calculated to taint the result with fraud and destroy the elements of fairness and equity in the plan. The Respondent has failed to establish the right of disallowance of any consents on this basis. However, if there were any disallowances it would reduce both claims and consents, with small effect on net remaining consents as the exclusion of *"claims* controlled by Petitioner" is what is required by the Statute.

[17] But which the Court now finds to have been proper and correct under the circumstances.

Where the Plan of Composition under consideration by the Court has been submitted by a qualified Petitioner, acting in good faith and where the consent in writing of two-thirds of the affected creditors exists, the Court then has the legal duty of determining whether the Plan is fair and reasonable and non-discriminatory and whether all costs and expenses are reasonable and proper in all regards, and upon so finding it should approve the plan. See *In Re Willacy County Water Control and Improvement District No. 1*, D. C. Tex. 1940, 36 F. Supp. 36. *McDonald v. Banta Carmona Irr. Dist.*, C. C. A. Cal. 1941, 123 F. (2d) 968, 47 Am. Bankr. Rep. N. S. 784. Certiorari denied, 62 S. Ct. 1034, 316 U. S. 668, 86 L. Ed. 1743.

This protestant complains that he was not given personal notice by mail though he alleges that his status as a bondholder was well known to Petitioner. He admits in his Answer that "first notice of this proceeding was received by your Respondent by way of newspaper publicity after the filing of this action." Respondent is undoubtedly referring to published reports of the filing of the Petition and the granting of Preliminary Order on August 25, 1964, which was carried in the Columbia, S. C., State and other papers on or about August 26, 1964, as shown by the record herein. This was in addition to formal publication of the Notice. From this and other evidence in the record, it is apparent that this protestant has had as much time in which to act responsively to the Petition and Order as any other Bondholder. He has failed to offer evidence of any definite or positive prejudice to his rights. He had not taken advantage of the right to register his bonds, which would have assured him the right to personal notice. The statute clearly contemplated that Notice given by publication is to apply to those not given Notice by mail. Protestant did not appear specially to question jurisdiction of this Court over him and his rights in this matter, but filed general Answer responsive to and controverting certain of the allegations of the Petition. He is properly before the Court and subject to its jurisdiction in all regards. His motion to dismiss or postpone the proceedings due to inadequacy of notice must be denied. The rights of Petitioner and of a large majority of its Bondholders could be seriously preju-

diced by any failure of this Court to handle this matter with proper dispatch, subject, of course, to allowing protestant his day in Court, which has been duly and properly given him.

Due notice of hearing was given as required by the Order of this Court dated August 25, 1964, by mailing of notice on August 28, 1964, to all known bondholders listed or referred to in the Petition of August 25, 1964, and by publication of notice once a week for three weeks in the State, at Columbia, S. C., and the Daily Bond Buyer, at New York, N. Y., commencing August 28, 1964. Affidavits on file in the record and testimony offered at the hearing commenced on October 30, 1964, at the Federal Courthouse in Greenville, S. C., pursuant to such notice, and thereafter continued on November 7, 1964, at the Federal Courthouse in Rock Hill, S. C., amply demonstrate proper compliance with the requirements of law as to the giving of notice. No affected creditor has filed Answer opposing approval of the plan, except James P. Mozingo, III, of Darlington, S. C., the holder of 71 bonds. Though he stated in his Answer that he was appearing only in his own behalf, he announced at the hearing that he represented a number of persons whom he named in the record, holding according to his calculations some 400 bonds, or about 10% of the total bonds outstanding.

Protestant complains of certain departures from the law, covenants and agreements, of the Authority, by its personnel and management. While this court allowed full explanation and cross examination, there is neither plan nor permission in Chapter 9 of the Bankruptcy Act for the determination of this issue in a debt composition proceeding. Its bearing on the question of approval of the plan has been fully considered by this Authority in accordance with the Court's duties and responsibilities as detailed in 11 U. S. C. A. § 403.

Other complaints by protestant fail to raise proper issues here, ignore the evidence in the record. Significant was a statement in protestant's brief that "Respondent filed a timely answer to the petition and despite inadequate preparation time is before the court by right, not by grace."

Protestant, according to Carolina's investment bankers [18] had the matter under advisement, and was being advised long in advance of the initial hearing which was recessed to give full time for cross examination and presentation.

Protestant seeks to have this court implant, as to certain holding of the fiscal agent and others, an interpretation that their action was not in "good faith". Cited to the court is *American United Mutual Life Ins. Co. v. Avon Park,* 311 U. S. 138, 61 S. Ct. 157, 87 L. Edit. 91, 136 A. L. R. 880. In that case the stated charge for handling by the fiscal agent was much less **if the bondholder should sell to the fiscal agent accrued interest coupons at a third of their face value.** No analogous or similar practice exists in the record before this Court. The record discloses no practice in fact, or in contemplation, not in "good faith". Uncontroverted is the fact that those accused by protestant will be affected **exactly** as protestant insofar as surrender of present and issuance of new bonds are concerned. Certain fees, necessary and usual, will accrue, and these are treated hereinafter. This Court finds no failure of disclosure in connection therewith.

Protestant complains that, under the reasoning of *Fano v. Newport Heights Irrigation District, et al.,* the plan of composition should be denied because Petitioner did not raise the gas rates. This court was impressed with the testimony that the Authority could not compete, could not keep its customers, if the rates were raised. Carolina Pipeline Company, ever in the shadows, appearing [19] openly at Rock Hill, did not offer any solution for attraction of new customers or retention of old under Carolina Pipeline rates or control of the Authority. This Court takes judicial notice of the effort of South Carolina public official and private business to attract new industry and the place of authorities such as Petitioner in the industry hunting spectrum. Not material to this issue was the inevitable question raised in the court's thinking of the chanelling of future new business—would it be tied in with, or sent to, Carolina, if Carolina had control of the authority, or to the

[18] See Note 12, *supra.*

[19] Pipeline President Warren and Attorney Knowlton testified at the hearing in Rock Hill, S. C.

Authority. Might not the position of the bondholders become precarious because of loss of business under higher rates, inability to expand under the higher rates, the new control? Therefore, the case of *Fano v. Newport Heights Irr. Dist.*, 114 F. (2d) 562, cannot be relied on for guidance here; the facts, the climate of operation by the Authority, the fact of competition, are different. This court is mindful, too, that the reasoning of the court in *Fano, supra,* was predicted: "In view of the **small amount** of deficiency in tax payments * * *"; there is no factual analogy to the deficiency here.

Other than a modification of the Plan of Composition insofar as the fees, etc., to be paid to be reduced, this court finds:

(1) It is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors;

(2) Complies with the provisions of this chapter;

(3) Has been accepted and approved as required by the provisions of subdivision (d) of this section;

(4) All amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable;

(5) The offer of the plan and its acceptance are in good faith; and

(6) The petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan.

Paragraph 6 of the original Petition reads as follows:

"(6) That allowances for refunding and improvement costs, as fixed without reference to necessity for this legal proceeding, which are hereby averred to be reasonable and necessary and which are payable solely by Petitioner without payment of any cost by any creditor or other person or agency, have been fixed and agreed upon, as follows:

Extensions and Improvements (3 years)	$ 380,000
Fee to Investment Bankers	
2½% on $3,778,000 Refunding Bonds	$ 94,450
2½% on $522,000 Improvement Bonds	13,050

Legal costs and expenses, including bond counsel	25,000
Exchange Agent	10,000
Printing new bonds	2,000
Administrative and miscellaneous costs	2,500
Total	$ 527,000

The Court finds these costs and fees need adjustment and approves:

Extensions and Improvements (3 years)	$ 380,000
Fee to Investment Bankers	
1½% on $3,778,000 Refunding Bonds	56,670
1½% on $522,000 Improvement Bonds	7,830
Legal costs and expenses, including bond counsel	17,500
Exchange Agent	7,500
Printing new bonds	2,000
Administrative and miscellaneous costs	2,000
Total	$ 473,500

Counsel for Petitioner have, to the knowledge of the court, performed other services, and the adjustment hereinabove does not include proper fees therefor, which this court will pass on at a later date.

The Plan of Composition is hereby approved as of this date, subject to the taking of proper action by Petitioner as hereinafter required.

Petitioner is hereby authorized and directed to forthwith proceed with implementation and carrying out of the Plan of Composition approved by this Order through immediate adoption of the Supplemental Resolution and immediate deposit with the fiscal agent for delivery pursuant to and subject to the requirements of the Resolution and Supplement Resolution of the Bonds of Series A and B and any interest now due thereon, together with the necessary Certificates of Indebtedness; whereupon the fiscal agent shall forthwith proceed with implementation of the plan of exchange and delivery defined in the Resolutions, all of which shall be accomplished within not exceeding 15 days after this Order shall become finally binding and effective.

Upon implementation of the Plan of Composition approved hereby through deposit by Petitioner with Citizens and Southern National Bank of South Carolina, at Columbia, S. C., as fiscal agent and as exchange agent, of all required Refunding and Improvement Bonds of Series A and B, all interest due thereon and all Certificates of Indebtedness necessary to provide for delivery of all Bonds of Series B and exchange of all Bonds of Series A in accordance with the Plan of Composition for all Outstanding Bonds and Coupons, whether deposited or not, and upon implementation of the plan of delivery and exchange, except as to bonds not yet deposited, then and thereupon the Outstanding Bonds shall be fully extinguished and shall no longer constitute an indebtedness due by Petitioner or any impediment to full validity of the Refunding and Improvement Bonds now being issued; provided that any still undeposited Outstanding Bonds and Coupons shall nevertheless be and continue acceptable for purposes of refunding exchange only, during the additional time allowed therefor under the provisions of paragraph (6) of this Order.

Bondholders who have not yet deposited their Outstanding Bonds and Coupons for refunding exchange shall be allowed until two years following the effective and binding date of final decree of approval of the Plan of Composition pursuant to subparagraph (f) of Section 403, Title 11, U. S. Code, or until the March 1, 1967, regular interest payment date, whichever shall last occur, within which to deposit such Outstanding Bonds and Coupons with the Citizens and Southern National Bank of South Carolina, at Columbia, S. C., as fiscal agent and as exchange agent for refunding exchange pursuant to the approved Plan of Composition, provided that after such latter date all liability of Petitioner under any undeposited Outstanding Bonds and/or Coupons and under any undelivered refunding Bonds and/or Certificates of Indebtedness deposited with the fiscal agent for purposes of refunding exchange shall stand fully extinguished because of the nondeposit of such Outstanding Bonds and Coupons within the time allowed by this Court; and that any such extinguished Refunding Bonds and/or Certificates of Indebtedness held by the Fiscal Agent shall be voided and delivered to Petitioner, all

consistently with provisions to this effect contained in the Notice of Hearing pursuant to the initial Order herein.

That the payments outlined hereinabove are approved, subject to modification or change on proper showing.

This Court retains continuing jurisdiction of this proceeding and of all persons subject to the jurisdiction of the Court herein pending and until all Outstanding Bond have been exchanged or all rights under any Outstanding Bonds have been fully and finally extinguished for all purposes, including validity soley for exchange for Refunding Bonds and Certificates of Indebtedness. Any person having proper interest may Petition this Court at any time on reasonable notice for any necessary and proper relief incident to implementation and carrying out of the Plan of Composition approved hereby; provided, however, that this provision of this Order shall not be construed to include the resurrection and restoration of any rights already finally extinguished by the provisions of this Order.

A final decree shall be issued herein following implementation of the Plan of Composition approved hereby.

AND IT IS SO ORDERED.

/s/ ROBERT W. HEMPHILL,
United States District Judge.

Greenville, S. C.,
February 10, 1965.

TRUE COPY
ATTEST:

MILLER C. FOSTER, JR., Clerk
By LYDIA BURRISS
Deputy Clerk

APPENDIX B

OPINION OF THE COURT OF APPEALS

PER CURIAM:

Composition of its indebtedness pursuant to the Bankruptcy Act, Chapter 9, Title 11, United States Code, was granted York County Natural Gas Authority by the District Court over the objection of James P. Mozingo, III. Appeling, he assigns error to the confirmation, with uncontested exceptions, of the plan submitted by York. See 11 USC 403. With a slight modification, we affirm the order.

The Authority is a body politic created under the laws of South Carolina and, concedely, is an agency or instrumentality qualified as a petitioner for the benefits of the statute. 11 U. S. C. 401(6), 402; Section 1-71, Code of Laws of South Carolina, 1962. Commencing in 1957 it issued revenue bonds to finance the extension of transmission and distribution lines to bring natural gas to residents in and about York County, S. C. When it invoked the Act, the Authority had bonds outstanding in the principal sum of $3,778,000.00, with interest of $736,936.00 accrued and unpaid.

The petition adequately pleaded an inability to meet these obligations. Generally, the plan it submitted provided for the exchange of interest-bearing, refunding bonds (Series A) in amounts corresponding to the outstanding issues. The new bonds would be accompanied by subordinated, non-interest, certificates of indebtedness equal to the unpaid interest. Certificates would also be issued for reimbursement of the bankers who had advanced the moneys for the last interest paid, March 1, 1961. Bonds (Series B) in the sum of $522,000.00, were also to be issued under the plan to raise funds with which to defray the expenses incident to the refunding and to meet the cost of improvements. Series B were to be bought by the investment bankers who were supervising the refinancing. A part of the proceeds would be used by the bankers to purchase outstanding bonds from persons unable or unwilling to exchange them for the new ones.

Additional ("parity") bonds would be authorized for issuance in the future to provide moneys to restore any damage to the system suffered through catastrophe or to acquire new property and meet the cost of general repairs, extensions, enlargements, or improvements to the system.

Another type of bond authorized was known as a prior lien bond. Such bonds could be issued if and when the Authority might deem it advisable to acquire or construct direct lines to new or different sources of supply.

Upon examination of the petition and supporting papers, the District Court ascertained that the required number of creditors had duly accepted the plan. Whereupon the petition was approved as properly filed. 11 U. S. C. 403(a). A hearing was then ordered upon the petition, to be preceded by requisite notice to creditors. 11 U. S. C. 403(b). After this hearing, or consideration of the evidence adduced by the petitioner to justify approval of the plan and by the appellant Mozingo in protest, the District Judge made written findings of fact with his conclusions of law thereon and confirmed the plan. He determined that the plan was "fair, equitable and for the best interests of the creditors" and otherwise met the requirements of the statute. 11 U. S. C. 403(e).

We cannot agree with the appellant that the findings of the District Judge are not well grounded in the evidence or that his conclusions are contrary to law. There was adequate proof of the acceptance and approval of both the petition and the plan by the necessary creditors. He scrutinized the consents for any disqualifying interest, whenever questioned, of those counted as favoring the plan. In the circumstances he was justified, too, in refusing to allow the withdrawal of certain of the consents to the plan which had been filed with the petition. No change had thereafter been made in the plan to the prejudice of these consenters, and the Court had previously acted upon their concurrence in accepting the petition. Cf. 11 U. S. C. 403(e); *Mason v. El Dorado Irr. Dist.*, 144 F. (2d) 189, 190 (9 Cir. 1944), cert. den. 323 U. S. 758, rehearing denied 323 U. S. 816.

Special objection was lodged by the protestant to the provision in the plan allowing issuance of the prior lien bonds already described, because these bonds would have primacy over the new refunding bonds. Their authorization was one of the proposals included in the plan as it was submitted to the creditors, in a memorandum, prior to their approval of the plan. The principal reason for the provision for these bonds was to safeguard the Authority from the hazard of entire and absolute dependence upon a single supplier of gas. Protection of the earlier bondholders against an abuse by the Authority of this power is found in the requirement of the plan that the bonds could be issued only after actual notice to the registrar of the outstanding bonds, and general notice by publication to their holders, of the intention to float prior lien bonds. This stipulation implies the right of the bondholders to an opportunity to be heard and to show cause why such bonds should not be issued. We are unpersuaded that the District Judge erred in not rejecting the plan because of its provision for prior lien bonds.

A further objection was directed to the allowance of a fee to the investment bankers who had agreed to undertake the execution of the plan. The compensation considered of a percentage of the face of such bonds as the bankers procured for exchange. The special point was made that the commission was allowable on bonds owned by the bankers in their own right and surrendered for exchange. The Court carefully weighed this factor and became satisfied of the fairness of the arrangement. It is significant that in approving the plan the Court appreciably reduced the compensation as originally proposed in the plan. This decision could have included a consideration of the argument pressed by the objector.

Our only difference with the District Judge is upon the time allowed those bondholders who at the date of the entry of the order were unable or unwilling to accept the plan, or were unknown, to present their bonds for exchange. In default of such timely tender, the bonds would be declared as no longer obligations of the Authority. 11 U. S. C. 403(f). The limitation was put at two years from the

effective day of the final decree or until March 1, 1967 (an interest period) whichever was the later date. We think that without detriment to the execution of the plan the permissible time for presentation of the old bonds should be extended until March 1, 1972. To comply the Authority has only to escrow a corresponding number of new bonds and certificates, with the designated fiscal agent, for delivery as and when the old bonds are tendered for exchange.

With this modification, the order on appeal will be affirmed.

Affirmed with Modification.

APPENDIX C

STATUTES

11 U. S. C. 403:

Acceptance of plan by creditors

(d) The plan of composition shall not be confirmed until it has been accepted in writing, by or on behalf of creditors holding at least two-thirds of the aggregate amount of claims of all classes affected by such plan and which have been admitted by the petitioner or allowed by the judge, but excluding claims owned, held, or controlled by the petitioner: *Provided, however,* That it shall not be requisite to the confirmation of the plan that there be such acceptance by any creditor or class of creditors (a) whose claims are not affected by the plan; or (b) if the plan makes provision for the payment of their claims in cash in full; or (c) if provision is made in the plan for the protection of the interests, claims, or lien of such creditors or class of creditors.

Fraudulent practices; confirmation of plan; sufficiency of findings; modifications; appeal

(e) Before concluding the hearing, the judge shall carefully examine all of the contracts, proposals, acceptances, deposit agreements, and all other papers relating to the plan, specifically for the purpose of ascertaining if the fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, has been or is to be compensated, directly or indirectly, by both the petitioner and the creditors thereof, or any of such creditors—either by fee, commission, or other similar payment, or by transfer or exchange of bonds or other evidence of indebtedness whereby a profit could accrue—and shall take evidence under oath to make certain whether or not any such practice obtains or might obtain.

After such examination the judge shall make an adjudication of this issue, as a separate part of his interlocutory decree, and if it be found that any such practice exists, he shall forthwith dismiss the proceeding and tax all of the

costs against such fiscal agent, attorney, or other person, firm, or corporation promoting the composition, or doing anything of such a nature, or against the petitioner, unless such plan be modified within the time to be allowed by the judge so as to eliminate the possibility of any such practice, in which event the judge may proceed to further consideration of the confirmation of the plan. If it be found that no such practice exists, then the judge may proceed to further consideration of the confirmation of the plan.

At the conclusion of the hearing, the judge shall make written findings of fact and his conclusions of law thereon, and shall enter an interlocutory decree confirming the plan if he finds and is satisfied that (1) it is fair, equitable, and for the best interests of the creditors and does not discriminate unfairly in favor of any creditor or class of creditors; (2) complies with the provisions of this chapter; (3) has been accepted and approved as required by the provisions of subdivision (d) of this section; (4) all amounts to be paid by the petitioner for services or expenses incident to the composition have been fully disclosed and are reasonable; (5) the offer of the plan and its acceptance are in god faith; and (6) the petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan. If not so satisfied, the judge shall enter an order dismissing the proceeding. No case shall be reversed or remanded for want of specific or detailed findings unless it is found that the evidence is insufficient to support one or more of the general findings required in this section.

Before a plan is confirmed, changes and modifications may be made therein with the approval of the judge after hearing upon such notice to creditors as the judge may direct, subject to the right of any creditor who shall previously have accepted the plan to withdraw his acceptance, within a period to be fixed by the judge and after such notice as the judge may direct, if, in the opinion of the judge, the charge or modification will be materially adverse to the interest of such creditor, and if any creditor having such right of withdrawal shall not withdraw within such period, he shall be deemed to have accepted the plan as

changed or modified: *Provided, however,* That the plan as changed or modified shall comply with all the provisions of this chapter and shall have been accepted in writing by the petitioner. Either party may appeal from the interlocutory decree as in equity cases. In case said interlocutory decree shall prescribe a time within which any action is to be taken, the running of such time shall be suspended in case of an appeal until final determination thereof. In case said decree is affirmed, the judge may grant such time as he may deem proper for the taking of such action.

Section 59-681, Code of Laws of South Carolina 1962. Existing rights not impaired by chapter.

Nothing in this chapter shall be deemed in any way (a) to alter the terms of any agreements made with the holders of any outstanding notes, bonds or other obligations of the municipality, (b) to authorize the municipality to alter the terms of any such agreements or (c) to impair or to authorize the municipality to impair the rights and remedies of any creditors of the municipality.

(A portion of the South Carolina Revenue Bond Refinancing Act.)

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1084

JAMES P. MOZINGO, III, PETITIONER,

versus

YORK COUNTY NATURAL GAS AUTHORITY,
RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATEMENT OF FACTS

The Statement in the Petition of the Petitioner seeking a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit is so sketchy that counsel for the Respondent are apprehensive that the issues here may not be readily comprehended.[1] Furthermore, certain state-

[1] Most of the proceedings are set forth as Appendices I, II, III, and IV to the Decree of the District Court (238 F. Supp., beginning at page 984).

ments in the Petition are at complete variance with the plan of composition approved by the District Court (238 F. Supp. 964) and affirmed by the Court of Appeals (352 F. (2d) 78).

Assertion is made in Petitioner's Statement, on page 3 of the Petition, that "the Court of Appeals approved portions of the plan which allowed some dissenting bondholders to be paid in cash for their bonds, while other dissenters, such as Petitioner, were denied any such option." Respondent asserts on the contrary that this statement is erroneous and constitutes a misinterpretation of the action of the Court of Appeals, for the reasons fully set forth in Question Number I under Respondent's Argument.

Amplifying Petitioner's Statement of Facts, Respondent points out that it is a public agency of the State of South Carolina. Committed to it was the function of constructing and operating a natural gas system to furnish natural gas service throughout York County, South Carolina. In order to raise the funds required for the construction of the system, it was authorized to issue revenue bonds payable solely from the revenues to be derived from the operation of its system. Pursuant to statutory authority duly given, it issued four series of bonds with serial maturities aggregating $3,778,000.00, whose proceeds were applied for that purpose.

These bonds were underwritten by a syndicate of investment bankers headed by White, Weld & Co. of New York. They were widely distributed throughout the eastern section of the United States and are now held by both institutional and private investors. Many are held in South Carolina.

From the outset the Authority encountered difficulties. Costs for construction were higher than expected and demand for gas was less than anticipated. Capitalized interest

was exhausted before earnings from operations were sufficient to meet the high interest cost at which Respondent had financed its construction. The original investment bankers faithfully kept abreast of the affairs of the Authority and rendered both advice and financial assistance.[2] Default nevertheless became inevitable.

After some improvement in earnings during several years of default in interest payments it was determined that if the rate of interest was reduced, the serial bonds converted to term bonds, and additional sums advanced for extensions to provide further customers, the Authority should be able to function in solvent condition. The refunding program and the Plan of Composition followed this determination and efforts to obtain required bondholders' consents were commenced early in 1964.

QUESTIONS PRESENTED

In order to simplify the Court's burden, we shall deal with questions presented in the Petition in the identical phraseology used by the Petitioner and in the chronological order appearing under Petitioner's heading "REASONS FOR GRANTING THE WRIT", which follows the numerical order of Petitioner's Questions.

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[2] On March 1, 1961, they advanced $95,758.00 to enable Respondent to meet certain coupons falling due on that date. 238 F. Supp. 969.

ARGUMENT

I. May a plan of composition under the provisions of 11 U. S. C. 403 (e) (1) be confirmed by a Federal Court as fair, equitable and non-discriminatory when the plan makes provision for payment in cash to some dissenting bondholder-creditors for their bonds, without providing for sufficient cash to make such payment to all dissenting bondholder-creditors of the same class, and without designating or disclosing which of said bondholders are to be preferred in making such payment?

The answer to the question as phrased by the Petitioner is obviously "No"; but the plan of composition presented to the District Court and approved by it and by the Court of Appeals contained no such inequitable provision and if it had it should not receive this Court's approval. All bondholders, assenting and dissenting, receive like treatment.

Under the plan submitted and approved, no dissenting bondholder is to be paid in cash. Each bondholder, assenting or dissenting, gets exactly the same security, *viz.*, bonds of Series A [3] for like face amount, plus Certificates of Indebtedness for unpaid interest to March 1, 1964. (See Appendix (a) and (b) .)

It is clearly apparent that both the District Court and the Court of Appeals made certain of this situation and required this result. Both courts have carefully prescribed a cut-off date and provided that if outstanding bonds not already deposited for direct exchange were not exchanged by that time, the obligations of the Authority with respect to such outstanding bonds would thereupon terminate.

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[3] While all bonds of Series A are term bonds, the Resolution provides for a mandatory call of the refunding bonds in chronological order out of surpluse earnings. The plan provides that in effecting the exchange, priority in numbering shall be observed among the outstanding bonds, so that those holding the earlier dated outstanding bonds shall receive lower numbered bonds than those who hold outstanding bonds of a later date.

Though the Court of Appeals made reference to use of a part of the proceeds of Series B Bonds by the investment bankers "to purchase outstanding bonds from persons unable or unwilling to exchange them for new ones", this single statement must be read in context to be interpreted fairly and to avoid a misleading and erroneous interpretation. It must also be read with due regard for all other provisions of the same Decree, and with every effort to properly reconcile any and all portions thereof. Here the Court was simply reciting background circumstances leading up to presentation of this matter to the District Court for consideration. As already noted, the Court of Appeals has without doubt negatived any such result by the cut-off date it properly prescribed.

It was recognized at the inception of planning for a refunding program that in certain instances, expected to be few in number, holders of Outstanding Bonds might be legally unable or unwilling to agree to the exchange. Initially the investment bankers were to be responsible for acquiring any such bonds through use of the proceeds of B Bonds on a Bond for Bond basis. However, it was soon recognized that any approach of this sort was capable of creating inequities which might require additional consent and approval of all other bondholders. Accordingly, this approach was abandoned and in its initial Petition for Approval of Plan of Composition (Appendix I to Order of District Court, 238 F. Supp. 984) the Respondent Authority sought, in paragraph 12 of the Petition and paragraph (g) of the prayer thereof, to have the Court provide for deposit with the Fiscal Agent of Refunding Bonds and Certificates of Indebtedness for all Outstanding Bonds not deposited, and for voiding of the Outstanding Bonds still undeposited on a prescribed date some two years later. The Court of Appeals extended this date by some five additional

years. Therefore, Petitioner's assertion that the Court of Appeals approved a discriminatory cash payment to some but not all dissenting Bondholders is entirely unwarranted and should be disregarded. In its actual disposition of this question the Court of Appeals said (Petitioner's Appendix B, p. 45):

> "Our only difference with the District Judge is upon the time allowed those bondholders who at the date of the entry of the order were unable or unwilling to accept the plan, or were unknown, to present their bonds for exchange. In default of such timely tender, the bonds would be declared as no longer obligations of the Authority. 11 U. S. C. 403 (f). The limitation was put at two years from the effective day of the final decree or until March 1, 1967 (an interest period) whichever was the later date. We think that without detriment to the execution of the plan the permissible time for presentation of the old bonds should be extended until March 1, 1972. To comply the Authority has only to escrow a corresponding number of new bonds and certificates, with the designated fiscal agent, for delivery as and when the old bonds are tendered for exchange."

The contention here raised that the plan as submitted to the District Court would permit dissenting bondholders to be paid in cash was not raised by the Petitioner either in the District Court or in the Court of Appeals. It is argued here for the first time and should be disregarded for this additional reason.

Respondent does not believe that there is any proper reason for concern on this point, but if this Court shall have the slightest doubt in the matter, it suggests that the Petition for Certiorari be conditionally dismissed with a proviso to the effect that no present bondholder receive one cent in cash and that all be required to accept Bonds of Series A and Certificates of Indebtedness pursuant to

the approved plan. Respondent further contends that Petitioner has failed to show any disregard of duty by the Court of Apeals requiring corrective supervision by this Court to sustain granting of the Writ.

II. May a plan of composition, under the provisions of 11 U. S. C. 403 (e) (5) be confirmed by a Federal Court where such plan fails to disclose an agreement for the payment of fees to certain bondholders for the filing of their acceptance of the plan, when other bondholders of the same class are not apprised of such payment and do not receive a like fee for the filing of their acceptance?

Under the Plan of Composition approved by Respondent Authority the investment bankers employed to handle the transaction were to be paid a fee of 2½% of each bond obtained by them for exchange. As modified by the District Court and affirmed by the Court of Appeals, this was reduced by some 40% to 1½%.

The many outstanding bonds had been handled by many investment bankers throughout the eastern section of the United States. It was recognized that these bankers would have to assist the investment bankers sponsoring the plan of composition, inasmuch as they would have to both study the plan and solicit acceptance thereof from their customers. It was recognized that they would incur expenses in this connection. Hence, it was provided that for every $1,000 bond which the investment bankers brought into the plan of composition they would receive a fee of ½ of 1% or $5.00 from the sponsoring investment bankers. No distinction was made between bonds which these investment bankers might own themselves and the bonds of their customers. This compensation was not to be paid by the Authority but by the investment bankers sponsoring the plan out of the fees payable to them, and the quantum of these

payments did not affect the basic compensation to be paid by the Authority to the investment bankers sponsoring the plan. This matter was disposed of by the Court of Appeals in the following language:

> "A further objection was directed to the allowance of a fee to the investment bankers who had agreed to undertake the execution of the plan. The compensation consisted of a percentage of the face of such bonds as the bankers procured for exchange. The special point was made that the commission was allowable on bonds owned by the bankers in their own right and surrendered for exchange. The Court carefully weighed this factor and became satisfied of the fairness of the arrangement. It is significant that in approving the plan the Court appreciably reduced the compensation as originally proposed in the plan. This decision could have included a consideration of the argument pressed by the objector."

We have pointed out that the $5 fee to be paid to other investment bankers who assist the investment bankers sponsoring the plan of composition merely diminishes the compensation of the sponsoring investment bankers and does not in any way alter the amount which the Authority is obligated to pay for this service. Of course, it is apparent that indirectly the money comes from the Authority, and, thus, in this way investment bankers who own bonds of the Authority are better off than individual bondholders who are not investment bankers, to the extent of $5 per bond. On the other hand, it is quite apparent that the $5 payment was not allowed in order to create a preference among creditors, but to establish a fair method of compensating the investment bankers for a totally different service, *viz.*, that of soliciting consents. Respondent believes that this aspect of the plan is fair and equitable.

Surely this is a *de minimis* situation, as to which the Court of Appeals did not feel concern. Certainly it should

not disturb the basic plan, nor further delay payments by the Authority to its unfortunate bondholders.[4]

The District Court carefully differentiated the instant case from that of *American Mutual Life Insurance Co. v. Avon Park,* 311 U. S. 138, 61 S. Ct. 157, 85 L. Ed. 91, 136 A. L. R. 14, relied upon by Petitioner, finding no comparable factual situation and no factual basis for Petitioner's claim of lack of good faith or failure of disclosure (Petitioner's Appendix A, p. 38). The Court of Appeals affirmed this factual finding. Petitioner has failed to establish the right to have that finding disturbed in this Court, or to have same presented to this Court for consideration under *Certiorari.* The finding is not at variance with prior decisions of this Court.

Further answering this question with a simple analogy, counsel often enjoy the privileges of a railroad pass in exchange for legal services rendered, but this is in no way discriminatory against fare paying passengers who have rendered no such service. In like manner, there is no discrimination against any bondholders by allowance of reasonable compensation to investment bankers for necessary services rendered in implementing the Plan of Composition.

Whether the fees paid to soliciting investment bankers generally for procurement for exchange of bonds held for themselves or for others are fair and reasonable and nondiscriminatory represents a pure question of fact determined by the District Court adversely to Petitioner and affirmed by the Court of Appeals.

Concurrent findings of fact by two Courts below will not ordinarily be disturbed by the Supreme Court, which does not ordinarily grant *certiorari* to the Circuit Court of

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[4] Interest on the refunding bonds accrues from March 1, 1964, and will be paid upon the final approval of the plan of composition. There is no practical means of paying undelivered and unsurrendered coupons.

Appeals to review evidence and to discuss specific facts. (*Workman v. New York,* 21 S. Ct. 212, 179 U. S. 522, 45 L. Ed. 314; *U. S. v. Johnston,* 45 S. Ct. 496, 268 U. S. 220, 69 L. Ed. 925, and 28 U. S. C. A. 1254, Note 58.)

III. May a Federal Court impair the obligation of a bond in confirming a plan of composition under the provisions of 11 U. S. C. 401, and following, by declaring that all bonds not tendered for exchange within a limited period of time shall be forfeited and become null and void and of no force and effect, notwithstanding that such bonds provide for their maturity beyond the time limited by the Court for the tender of such bonds for exchange?

In the proceedings in the District Court, the Authority sought and obtained a cut-off date fixed at:

> "two years following the effective and binding date of final decree of approval of the Plan of Composition pursuant to subparagraph f of Section 403, Title 11, U. S. Code, or until the March 1, 1967 regular interest payment date, whichever shall last occur." [5]

for the surrender of outstanding bonds of the Authority in exchange for refunding bonds of Series A and Certificates of Indebtedness. The Order of the District Court further provided that unless outstanding bonds were deposited and exchanged within this period, all liability of the Authority with respect thereto should be extinguished.

This aspect of the Plan of Composition approved by the District Court was modified by the Court of Appeals, which extended the date for the deposit of outstanding bonds until March 1, 1972.

The power of the District Court sitting in bankruptcy to prescribe a date for the filing of claims and the extinguishment of claims against a bankrupt is inherent under

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[5] 238 F. Supp. 983.

the general bankruptcy laws. The time here provided, March 1, 1972, is more than equitable, for surely a period which even now extends for some six years from this date is ample to permit all persons who hold bonds of the Authority to learn of the plan and to take advantage of the exchange which it offers. A far shorter length of time was allowed in the case of *San Augustine County v. Cameron County Water Improvement District,* 202 F. (2d) 932. Like ruling occurred in *Gladeview Drainage District, Palm Beach County, Florida v. Keys,* 258 F. (2d) 273, *Certiorari* denied 79 S. Ct. 579, 359 U. S. 906, 3 L. Ed. 571.

The argument here suggests a complete misapprehension by the Petitioner of the nature of bankruptcy procedures and their resultant effect upon the bankrupt's creditors. It is a *sine qua non* that every bankruptcy procedure must affect, oftentimes adversely, the rights of the bankrupt's creditors, for bankruptcy is an extraordinary procedure made necessary by the inability of the bankrupt debtor to perform in accordance with the tenor of his existing obligations. But every contract is made subject to the laws of bankruptcy and the power of the Congress to legislate on this subject is expressly conferred by the Constitution of the United States, which provides that Congress shall have the power to establish uniform laws on the subject of bankruptcy throughout the United States, and to make all laws which shall be necessary and proper for carrying into execution the powers so granted.

Respondent has not asked to be discharged from liability on $600,000.00 in bonds as asserted by Appellant. It seeks only what may be called clean up relief by way of discharge from remaining responsibility as to such limited number of bonds as may remain outstanding, after full and ample opportunity for completion of the refunding exchange during a period now fixed by the Court of Ap-

peals for termination on March 1, 1972, which allows ample time for compliance with the Order of the District Court requiring surrender of all Outstanding Bonds for refunding exchange. This provision seeks relief only after continued failure of bondholders to surrender their bonds for refunding exchange as directed by the District Court. This procedure is fully supported by law (11 U. S. C. A. 430(f) and Note 30(a) thereunder. See *Mason v. Merced, Irr. Dist.* C. C. A. 1948, 165 F. (2d) 634, *certiorari* denied, 68 S. Ct. 1528, 334 U. S. 858, 92 L. Ed. 1778, rehearing denied, 69 S. Ct. 15, 335 U. S. 837, 93 L. Ed. 389, wherein extinguishment of rights under bonds not surrendered in 45 days after Order of District Court so requiring became final was declared reasonable.)

Petitioner charges that Respondent's request for a cut-off date raises a question as to whether the plan is fair and equitable and whether Respondent has acted in good faith. (Petition page 6.) Again these are matters of fact already determined adversely to Petitioner by two Courts below. Nevertheless, Respondent points out that the inclusion of a cut-off provision authorized by the applicable federal statute can constitute no evidence of lack of good faith as suggested by Petitioner. Bonds adequate to refund and exchange all outstanding bonds will be deposited with the Fiscal Agent and left on deposit until the end of the prescribed cut-off date approved by the Court. What Respondent seeks by this provision is to be relieved of the necessity of leaving such refunding bonds with the Fiscal Agent forever, and continuing to provide interest payments for such bonds, after same are not exchanged for Outstanding Bonds within the time approved and allowed by the Court. This provision is entirely reasonable and imposes no undue hardship on any bondholder.

IV. May a Federal Court, in furtherance of a plan of composition, force the holders of first-mortgage bonds to surrender their bonds, and accept in exchange therefor, refunding bonds which allow the debtor to issue an unlimited number of "prior lien bonds" which constitute a claim superior to that of the refunding bonds?

Here again, as under Question III, is a matter of exercise of the powers of bankruptcy by a Federal Court having jurisdiction to administer the provisions of this federal statute. The Bankruptcy Act admittedly works an impairment of the obligation of contracts. This is particularly true as to those provisions discharging certain bankrupt debtors from their obligations in their entirety, but it is uniformly held that the provision of the Constitution of the United States proscribing states from passing laws impairing the obligation of contracts limits the states only but does not limit or impair the plenary power of the Congress to enact bankruptcy laws which do impair the obligation of contracts. This gives to the Court the right to alter the prior Bond Contract and to prescribe the terms of the new Bond Contract as it shall deem necessary and proper.

The 1964 South Carolina statute (No. 1373), set forth *in toto* in the Decree of the District Court (238 F. Supp. 969), specifically provides that the refunding bonds "shall have such claim to the revenues of the system as the Authority shall provide". The obvious wisdom of the provision permitting the issuance of prior lien bonds is apparent.

Both the outstanding bonds and the proposed refunding bonds are payable from revenues remaining after meeting the costs of operation and maintenance, including specifically the cost of purchasing gas. Without payment of operating costs there would be no operations and no revenues. Hence it is uniformly recognized in the issuance of

Revenue Bonds that the Bond Resolution must provide for payment of operational costs ahead of debt service costs. The provisions of the Refunding Bond Resolution for issuance of Prior Lien Bonds [6] requires that same may not be issued except under a Certificate of Consulting Engineer showing that operation of the system will be improved and that the unit cost of gas, following acquisition or construction of any transmission line to a new source of gas supply, will not be increased. This is designed to insure that operational costs shall not be increased in such manner as to reduce revenues remaining for debt service. In fact if operations are improved, it could well increase the revenue available for debt service.

The Plan of Composition necessarily took cognizance of the situation faced by the Authority in connection with its gas supply. The Authority is not a producer of natural gas, nor does it have access to the transmission lines of any interstate supplier. It was and is wholly dependent for gas upon an intrastate company,[7] which in turn buys gas from two major pipeline companies (Transcontinental and Southern Natural).

Without a sufficient supply of gas, the Authority is helpless, both to fulfill its function or to pay its creditors. The record establishes that the Respondent has a gas supply contract with its present supplier expiring in 1978. The refunding bonds are expressed to mature in the year 1994. Accordingly, the proceedings provide that if it became necessary to obtain a supply of gas, the Authority might issue prior lien bonds whose proceeds should be used to defray the cost of acquiring transmission lines in order to provide a source of supply for the system of the Authority.

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[6] See Appendix (c).

[7] The unusual interest of the Authority's supplier is discussed by the District Court at some length, beginning at the bottom of page 976, 238 F. Supp.

The Court of Appeals disposed of this same objection in the following language:

> "Special objection was lodged by the protestant to the provision in the plan allowing issuance of the prior lien bonds already described, because these bonds would have primacy over the new refunding bonds. Their authorization was one of the proposals included in the plan as it was submitted to the creditors in a memorandum prior to their approval of the plan. The principal reason for the provision for these bonds was to safeguard the Authority from the risk of entire and absolute dependence upon a single supplier of gas. Protection of the earlier bondholders against abuse by the Authority of this power is found in the requirement of the plan that the bonds could be issued only after actual notice to the registrar of the outstanding bonds, and general notice by publication to their holders, of the intention to float prior lien bonds. This stipulation implies the right of the bondholders to be heard and to show cause why such bonds should not be issued. We are unpersuaded that the District Judge erred in not rejecting the plan because of its provisions for prior lien bonds."

Again it is noted that the power of a bankruptcy court to modify existing contracts is obvious and apparent. Thus the question here is simply one of whether this aspect of the plan is fair and equitable. The finding of fairness by the District Court was in reality the resolution of a factual matter. Following its approval by the Court of Appeals, it should not be disturbed here after prior approval by two Courts below. Certainly nothing has been advanced in the argument of Petitioner which would indicate a need for or right to this result.

No novel point of law is involved. It has long been fully recognized by decisions of this Court that federal bankruptcy laws take precedence over state laws which would impair efficacy of the Bankruptcy Laws.

CONCLUSION

From the foregoing it is apparent that the Petition for Writ of *Certiorari* has no basic substance and should be denied. Rule 19 of the Rules of the Supreme Court specifically prescribes that a review on writ of *Certiorari* is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. No reason of the character required by the Rule has been shown to exist in this case. The matters complained of appear to flow from improper and unwarranted interpretation of the findings and rulings below and from complaint as to basic factual determinations supported by action of two Courts below and not normally subject to further consideration by this Court. Respondent has vainly sought final authority during almost two years to resume interest payments to its bondholders under the approved Plan of Composition. It is right and proper and in the best interests of these bondholders, of the Respondent Authority and of the general public served by the Authority that *Certiorari* be forthwith denied to the end that the approved Plan of Composition may be implemented without further delay.

Respectfully submitted,

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HUGER SINKLER,
Attorneys for Respondent.

Rock Hill, S. C.,
March 10, 1966.

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Respondent's Refunding Bond Resolution Provisions providing for:

(a) Findings of Fact (Petitioner's Exhibit H)—

Section 1.01

11. The AUTHORITY is mindful that in certain instances, thought to be few in number, holders of OUTSTANDING BONDS may be legally unable or will rufuse to agree to the exchange and that as a consequence it will become necessary for the INVESTMENT BANKERS to acquire such OUTSTANDING BONDS. The INVESTMENT BANKERS for their part have agreed, within certain limitations, to make such acquisitions. To the extent of such acquisitions, and within the limit prescribed by the contract between the AUTHORITY and the INVESTMENT BANKERS, the AUTHORITY will issue BONDS which shall bear the rate of interest to be borne by the $522,000 portion of the BONDS, but all of such BONDS shall be given the higher numberings than BONDS that are directly exchanged, so that (except through a partial refunding as authorized by Section 10.04) such portions of the BONDS will become subject to redemption subsequent to the redemption of the BONDS directly exchanged for OUTSTANDING BONDS. Each BOND so issued shall be delivered to the INVESTMENT BANKERS in exchange for an OUTSTANDING BOND so acquired, and, in addition a CERTIFICATE shall be delivered to the INVESTMENT BANKERS for any matured and unpaid interest coupons accompanying such OUTSTANDING BOND.

12. In the adoption of this RESOLUTION the AUTHORITY proposes to provide for the issuance of BONDS to effectuate the plan above described, to prescribe the terms and conditions under which the BONDS will be issued, and to make provision for their payment. It is mindful that in view of unknown factors now existing, particularly those factors relating to the number of OUTSTANDING BONDS which shall not be exchanged by their holders, it cannot now precisely prescribe the amount of BONDS that will be directly exchanged and the number of BONDS that must be acquired by the INVESTMENT BANKERS.

For this reason a resolution supplemental to the RESOLUTION must be adopted, but in order that the RESOLUTION shall fairly present the plan, it has been assumed, for the purposes of the RESOLUTION, that the INVESTMENT BANKERS must acquire $100,000 of OUTSTANDING BONDS of the AUTHORITY which they will exchange for BONDS NOW authorized. For convenience in preparing the exhibit referred to in paragraph 9 *supra*, it has been assumed that the entire $100,000 of OUTSTANDING BONDS so acquired by the INVESTMENT BANKERS were those OUTSTANDING BONDS which constituted the last numbered part of the 1988 maturity of the third series of OUTSTANDING BONDS (those dated July 1, 1959).

(b) Issuance of Bonds

(1) Under the original Resolution (Petitioner's Exhibit H)—

Section 7.01

Pursuant to the ENABLING ACT, and in order to refund OUTSTANDING BONDS, and to improve the SYSTEM, there shall be issued Four Million Three Hundred Thousand Dollars ($4,300,000) Natural Gas System Refunding and Improvement Revenue Bonds of York County Natural Gas Authority. The said BONDS shall be dated the 1st day of March, 1964, shall be numbered from 1 to 4,300, inclusive, and all BONDS shall mature on March 1, 1964.

Section 7.02

In order to provide bonds for the purpose of exchanging the same with OUTSTANDING BONDS in the aggregate principal amount of $3,678,000, tendered by their respective HOLDERS for their exchange, $3,678,000 of the BONDS shall be designated as BONDS of Series A and shall be numbered from 1 to 3,678, inclusive.

Section 7.03

The remaining $622,000 of BONDS which have been sold to the INVESTMENT BANKERS, in order to provide

funds to meet the expenses of the refunding plan, to provide improvements to the SYSTEM, and to provide funds for OUTSTANDING BONDS acquired by the INVESTMENT BANKERS from persons unwilling or legally unable to agree to the exchange plan, shall be designated as BONDS of Series B and shall be numbered from 3,679 to 4,300, inclusive.

(2) Under the Supplemental Resolution amending the Original Resolution to conform to the Plan of Composition submitted to and approved by the District Court (Petitioner's Exhibit H-1)—

Section 3.01

Sections 7.02 and 7.03 of the RESOLUTION are herewith stricken and the following shall be inserted in lieu thereof:

"Section 7.02

In order to provide bonds for the purpose of exchanging the same with OUTSTANDING BONDS in the aggregate principal amount of $3,778,000, tendered by their respective HOLDERS for their exchange, $3,778,000 of the BONDS shall be designated as BONDS of Series A and shall be numbered from 1 to 3,778, inclusive."

"Section 7.03 [8]

The remaining $522,000 of BONDS which have been sold to the INVESTMENT BANKERS, in order to provide funds to meet the expenses of the refunding plan, and to provide improvements to the SYSTEM, shall be designated as BONDS of Series B and shall be numbered from 3,779 to 4,300, inclusive."

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[8] Note deletion from Section 7.03 as amended of the words "and to provide funds for Outstanding Bonds acquired by the Investment Bankers from persons unwilling or legally unable to agree to the exchange plan."

(c) Prior Lien Bonds (under original Resolution—no change made—Petitioner's Exhibit H).

Section 6.01

Both the BONDS and the OUTSTANDING BONDS are prescribed to be payable from the revenues derived by the AUTHORITY from the operation of the SYSTEM remaining after payment of the costs of operating and maintaining the same. The principal cost of operation involves the purchase of gas. At the present time the AUTHORITY is purchasing gas from Carolina Pipeline Company (CAROLINA), a small transmission pipeline company, which in turn buys gas from TRANSCONTINENTAL. Included in the cost of gas purchased by the AUTHORITY from CAROLINA is the cost incurred by CAROLINA in transporting gas through its transmission lines. Disputes have occurred between the AUTHORITY and CAROLINA as to whether the charges of CAROLINA are reasonable, and the AUTHORITY wishes to remain free to obtain gas from other sources upon the termination of its contractual relations with CAROLINA.

In order to obtain gas from some other source the AUTHORITY must be in a position to pay all or some portion of the cost of a transmission line betwee the SYSTEM and an adequate source of supply. Lancaster County Natural Gas Authority and Chester County Natural Gas Authority operate, in their respective counties, systems similar to that which the AUTHORITY operates in York County. It is possible that these latter named Authorities, or other agencies, public or private, might wish to cooperate with the AUTHORITY in acquiring, or constructing a transmission line to connect with the transmission pipeline now operated by TRANSCONTINENTAL, or with some similar source of supply. For that reason it has been determined that it is necessary to reserve the right to issue bonds whose claim to the revenues of the SYSTEM will be superior to the claim of the BONDS and the claim of ADDITIONAL BONDS. The issuance of PRIOR LIEN BONDS for such purpose would not, in the belief of the AUTHORITY, impair the security offered to those who

will hold the BONDS or ADDITIONAL BONDS, for the reason that debt service on such PRIOR LIEN BONDS will be in lieu of a large portion of the cost of operation and maintenance of the SYSTEM.

Section 6.02

The AUTHORITY reserves at all times the right to issue, from time to time and to such extent as the AUTHORITY shall deem necessary, bonds (PRIOR LIEN BONDS) whose proceeds shall be used to defray all or any portion of the cost of acquiring, constructing, improving or enlarging a transmission line or lines, in order to provide a source for a supply of natural gas for its SYSTEM. PRIOR LIEN BONDS may also be issued to refund outstanding PRIOR LIEN BONDS. Any such transmission line shall be designd in such a way as to make it possible for the SYSTEM of the AUTHORITY to function without using the systems of CAROLINA or any corporation which may succeed to the business of CAROLINA, (unless, pursuant to this Article the AUTHORITY, alone or in conjunction with others, shall acquire all or a part of the CAROLINA System). Such PRIOR LIEN BONDS may be issued to further any plan whereby the AUTHORITY will cooperate with other agencies, public or private, and may be issued from time to time in such amounts as shall be certified to by CONSULTING ENGINEERS as being required to defray the cost of acquiring, constructing, improving or enlarging such a transmission line or lines, but no such PRIOR LIEN BONDS (except PRIOR LIEN BONDS to refund PRIOR LIEN BONDS), shall be issued unless

(1) the AUTHORITY shall furnish a certificate of Certified Public Accountants detailing the quantities and costs of gas purchased by the AUTHORITY during each of the two preceding FISCAL YEARS;

(2) the AUTHORITY shall obtain a certificate from the CONSULTING ENGINEERS that the functioning of its existing SYSTEM will be improved and that the unit cost of gas to the AUTHORITY, as established by the certificate referred to in paragraph (1),

supra, following the acquisition or construction of such transmission line or any enlargement or improvement thereof, will not be increased over its comparable unit cost during each of the two preceding FISCAL YEARS by such an undertaking; and

(3) notice of the proposed issue of PRIOR LIEN BONDS shall have been given in writing, not less than ninety (90) days prior to the issuance of PRIOR LIEN BONDS, to the INVESTMENT BANKERS and to the FISCAL AGENT, and shall have been published in a financial publication published in the Borough of Manhattan, City and State of New York. If the Daily Bond Buyer shall then be published, the notice shall be inserted in one of its issues.

Section 6.03

PRIOR LIEN BONDS may be issued at any time, or from time to time, to refund outstanding PRIOR LIEN BONDS whenever the net dollar interest cost of proposed PRIOR LIEN BONDS is less than the existing net dollar interest cost of the PRIOR LIEN BONDS to be refunded. Such calculation of net dollar interest cost shall be made as of the date of the proposed refunding.